Filed 3/19/19 Skomal v. Hupp CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BERNARD GEORGE SKOMAL Plaintiff and Respondent, v. PAUL HUPP, Defendant and Appellant.	D074084 (Super. Ct. No. 37-2018-00009150-CU-HR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Tamila E. Ipema, Judge. Affirmed.

Paul Hupp, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Paul Hupp appeals from a civil harassment restraining order entered against him on April 6, 2018. Hupp contends that (1) insufficient evidence supports the issuance of the restraining order; and (2) the issuance of the restraining order violates Hupp's First Amendment rights because it is based on his conduct in petitioning the court. We conclude that Hupp has failed to provide a sufficient record to support his appeal because

he has elected not to provide a reporter's transcript or any other record of the evidence presented at the hearing on the restraining order, such as a settled statement. We accordingly presume that the evidence presented to the trial court at the hearing on the restraining order supports the issuance of the restraining order, and we affirm the order.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2018, United States Magistrate Judge Bernard George Skomal filed a request for a civil harassment restraining order against Hupp. As explained in the declaration accompanying Judge Skomal's request, Hupp was a litigant in a pending civil case in federal court, to which Judge Skomal was assigned as the magistrate judge. Hupp left telephone messages for Judge Skomal on February 17, 18 and 20, 2018, on the chamber's telephone. As described by Judge Skomal's declaration, "in essence" Hupp stated on the messages: "I'm calling to confirm my status conference on March 5, 2018 at 1:30. If this case is taken off calendar or pulled for any circumstance before that date, and I don't have a chance to be heard, tell Judge Skomal I'm going to show up at his home that evening and we'll talk about the status of his case at his front door steps." On February 22, 2018, Judge Skomal received a letter from Hupp sent to his home reflecting the same content as the phone messages.

On April 6, 2018, after holding a hearing, the trial court issued a restraining order for a period of five years, which ordered that Hupp refrain from harassing or contacting Judge Skomal, and that Hupp stay at least 100 yards away from Judge Skomal and his

home, work and vehicle. Hupp did not appear at the April 6, 2018 hearing, and the record contains no indication of any written opposition from him.[1]

Hupp filed a notice of appeal on May 3, 2018. In designating the record for appeal, Hupp specified that he was electing to proceed without a reporter's transcript, stating "Hupp will proceed by Appendix pursuant to California Rules of Court Rule 8.124; without Reporters Transcripts."[2] Hupp filed an opening appellate brief, but respondent has not appeared in the appeal.

---

1 Hupp has included in the appellate record, a document filed March 15, 2018, which is confusingly titled "Specially appearing respondent Paul Hupp's notice of motion and motion to quash service of process and to vacate January 18, 2017, hearing; memorandum of points and authorities; declaration of Paul Hupp; alternatively motion for evidentiary hearing on service of process/exten[s]ion of time." (Capitalization omitted.) The motion argued that Hupp was not properly served with the paperwork relating to the restraining order application. It appears from the Register of Actions included in the appellate record, that as a result of Hupp's motion, the hearing on the restraining order originally set for March 16, 2018, was continued to April 6, 2018.

2 Hupp does not indicate whether the April 6, 2018 hearing was reported, and he has not included the minutes from that hearing in the appellant's appendix, which might indicate more about the nature of the proceedings and whether they were reported. Moreover, as Hupp did not appear at the April 6, 2018 hearing, there is no indication that he sought to have the hearing reported but was denied such a request. Even if no reporter's transcript was prepared, the Rules of Court allow a party to present a settled statement of proceedings that occurred at an unreported hearing for the purposes of appellate review. (Cal. Rules of Court, rules 8.130, 8.137.)

II.

DISCUSSION

A person who has suffered harassment may seek an injunction prohibiting further harassment. (Code Civ. Proc., § 527.6, subd. (a)(1).) As relevant here, " '[h]arassment' is . . . a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (*Id.,* § 527.6, subd. (b)(3).) A " '[c]ourse of conduct' is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including . . . making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means . . . ." (*Id.,* § 527.6, subd. (b)(1).) If after a hearing the trial court "finds by clear and convincing evidence that unlawful harassment exists, an order shall issue prohibiting the harassment." (*Id.,* § 527.6, subd. (i).) "An injunction restraining future conduct is only authorized when it appears that harassment is likely to recur in the future." (*Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 496 (*Harris*).)

Here, Hupp contends that the restraining order was not supported by substantial evidence because (1) he did not commit harassment or a course of conduct constituting harassment in that he was engaged in the "legitimate" and lawful activity of attempting to secure a hearing date from Judge Skomal and "sending him personal notice of that

hearing date"; and (2) harassment is not likely to recur in the future because Judge Skomal is no longer assigned to Hupp's federal litigation, having recused himself. Hupp also contends that the issuance of the restraining order violates his First Amendment right to petition and to access the courts, as the restraining order was based on Hupp's "legitimate" conduct in trying to secure a hearing date as a litigant in federal court.

"We review the trial court's decision to grant the restraining order for substantial evidence." (*Harris*, *supra*, 248 Cal.App.4th at p. 497.) " 'The appropriate test on appeal is whether the findings (express and implied) that support the trial court's entry of the restraining order are justified by substantial evidence in the record. [Citation.] But whether the facts, when construed most favorably in [petitioner's] favor, are legally sufficient to constitute civil harassment under [Code of Civil Procedure,] section 527.6, and whether the restraining order passes constitutional muster, are questions of law subject to de novo review.' " (*Harris*, at p. 497.)

We understand Hupp's arguments. However, Hupp's appeal fails because he has not carried his burden on appeal to provide an adequate record to allow us to review his claim that insufficient evidence supports the order, or his claim that the restraining order was based on protected First Amendment activity. Although Hupp has included in the appellate record the written request for issuance of a restraining order filed by Judge Skomal on February 25, 2018, which includes Judge Skomal's declaration, the issuance of a restraining order is not based solely on the evidence set forth in an application. Instead, the statute provides that at the hearing on the restraining order, the trial court "shall receive any testimony that is relevant, and may make an independent inquiry. If

the judge finds by clear and convincing evidence that unlawful harassment exists, an order shall issue prohibiting the harassment." (Code Civ. Proc., § 527.6, subd. (i).) Thus, to review Hupp's contention that insufficient evidence supports the order, as well as his contention that he engaged solely in protected First Amendment activity, we must review the evidence presented at the hearing held on April 6, 2018. Hupp has not provided any record of that hearing, and has not even provided the court minutes of the proceeding.

"[I]t is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment. . . . 'This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' . . . 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented." ' . . . ' "A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " . . . 'Consequently, [the appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant].' " (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609, citations omitted.)

Here, in the absence of a reporter's transcript, or any other indication of what occurred at the hearing, such as a settled statement, we presume that the evidence presented at the hearing supports the trial court's issuance of the restraining order.

Moreover, assuming that the evidence presented at the April 6, 2018 hearing was substantially similar to the evidence in Judge Skomal's declaration, there is no merit to Hupp's contention that issuance of the restraining order was based on his "legitimate" exercise of the First Amendment right to petition and to access the courts. The First Amendment right to petition the courts and participate in those court proceedings does not include any right to confront a federal judge at the judge's home.

Accordingly, we conclude that Hupp's appeal is without merit.

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.